CLAIM NO: 00989

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER of an adjudication

BETWEEN **JENNIFER TERESA SMITH** and **MARK ALAN PRESTWOOD**
Claimants

AND **WELLINGTON CITY COUNCIL**
First Respondent

AND **CYRIL POTTER**
Second Respondent

AND **CRAIG CANDY**
Third Respondent

AND **MARK DALY**
Fourth Respondent

DETERMINATION OF ADJUDICATOR
(Dated 6 August 2007)

INDEX TO DETERMINATION

1. BACKGROUND

1.1 The Claimants lodged a claim under the Weathertight Homes Resolution Services Act 2002 ("the WHRS02 Act"). The claim was deemed to be an eligible claim under the WHRS02 Act. The Claimants filed a Notice of Adjudication under s.26 of the WHRS02 Act on 26 January 2006.

1.2 Adjudicator Scott was assigned the role of adjudicator to act for this claim, and he convened a preliminary conference on 23 June 2006, for the purpose of setting down a procedure and timetable to be followed in this adjudication. He issued seven Procedural Orders to assist in the preparations for the Hearing, and to monitor the progress of these preparations. Although these Procedural Orders are not a part of this Determination, they are mentioned because some of the matters covered by these Orders may need to be referred to in this Determination.

1.3 About one month prior to the hearing, Adjudicator Scott found that he was overcommitted and thus unable to preside over the hearing. I was assigned the role of replacement adjudicator to hear and determine the claims. The hearing was held on 9 and 10 May in the WHRS meeting rooms, at 86 Customhouse Street, Wellington. The Claimants were represented by Mr Fintan Devine of Harkness & Peterson; the Wellington City Council, the first respondent, was represented by Ms Frana Divich of Heaney & Co; Mr Cyril Potter, the second respondent, represented himself; Mr Craig Candy, the third respondent, was represented by Tim Cleary barrister; and Mr Mark Daly, the fourth respondent, was represented by Mr Costas Matsis.

1.4 I conducted a site inspection of the property at 9.30 am on 11 May 2007, immediately after the close of the hearing in the presence of Ms Smith and Mr Prestwood, the WHRS assessor and representatives of some of the respondents. I had indicated at the hearing that I intended to ask Mr White to take some samples at my site inspection of the external texturing and paint. This was done, the samples were sent for analysis, and the results were circulated to all parties, who were given the opportunity to comment on the results.

1.5 All the parties who attended the hearing were given the opportunity to present their submissions and evidence and to ask questions of all the witnesses. Evidence was given under oath or affirmation by the following:

- Mr Mark Prestwood, one of the claimants;
- Ms Jennifer Smith, the other claimant;
- Mr Terry O'Connor, a registered architect and building consultant, called by the claimants;
- Mr Colin White, the WHRS Assessor, called by the adjudicator;
- Mr Stephen Cody, a team leader in the building consents division of the Council, called by the Council;
- Mr Cyril Potter, the second respondent;
- Mr Craig Candy, the third respondent;
- Mr Mark Jarvis, called by the third respondent;
- Mr Mark Daly, the fourth respondent;

1.6 All parties were invited to make closing submissions at the hearing after all the evidence had been given. Before the hearing was closed I asked the parties if they had any further evidence to present or submissions to make, and all responded in the negative.

2. THE PARTIES

2.1 The Claimants in this case are Ms Smith and Mr Prestwood. I am going to refer to them as "the Owners". They agreed to purchase the house and property at 21B Murchison Street, Island Bay, Wellington, in January 1998 from Mr Cyril Potter and his then wife. The purchase was settled in March 1998. At that time the house had been built for about one year.

2.2 The first respondent is the Wellington City Council ("the Council"), which is the territorial authority responsible for the administration of the Building Act in the area. The Council reviewed the application for a building consent, issued the consent, and carried out the inspections during construction, and issued a Final Code Compliance Certificate for the building work.

2.3 The second respondent is Mr Cyril Potter, who had the house built for himself and his wife by a company called Tri Housing Co Ltd ("Tri Housing"). This company is no longer trading and has been liquidated. Mr Potter applied the outside texture coating and carried out the painting work on the building. It is alleged that Mr Potter was involved in a lot more of the construction work.

2.4 The third respondent is Mr Craig Candy, who was a director of Tri Housing at the time that this house was built. He was involved as a builder on this site and it is alleged that he was the main builder for the house.

2.5 The fourth respondent is Mr Mark Daly, who was the other director of Tri Housing at the time that this house was built. He was Mr Potter's son-in-law at the time, and he says that his role in the construction of this house was as a director of the development company, and as a marketing person. It is alleged that Mr Daly had a lot more to do with the construction process that he admits.

3. CHRONOLOGY

3.1 I think that it would be helpful to provide a brief history of the events that have led up to this adjudication.

16 July 1996	Application for building consent;
14 August 1996	Foundations completed;
10 September 1996	Timber framing completed;
3 October 1996	Pre-line inspection by Council;
6 November 1996	Building consent issued;
10 February 1997	Final Code Compliance Certificate;
11 January 1998	Owners enter into Sale & Purchase agreement;
27 March 1998	Owners settle purchase of property;
8 January 2003	Owners obtain a Maintenance report on the house;
April 2003	Owners learn that they have a leaking problem;
27 May 2003	Owners make application to WHRS;
26 June 2003	Owners employ Joyce Group to inspect and report;
16 April 2004	WHRS Assessor report completed;
25 January 2006	Owners file Notice of Adjudication.

4. THE CLAIMS

4.1 The claims being made by the Owners in their Notice of Adjudication (25 January 2006) are for the following amounts:

• Repairs in June 2003 (insurance excess)	90.00
• Estimated cost of repair work (as Ortus estimates)	137,812.50
• Carpet replacement	4,751.00
• Redecoration of interior	7,290.00
• Consultants costs	

Original Joyce Group report	1,037.25
Second Joyce Group report	4,331.24
Builder's costs for testing panels	697.50
Ortus estimating fees	956.25
• Cost of sealant in October 2005	38.44
• Interest on expenditure to date	447.82
• General damages, for both claimants	60,000.00
Total amount being claimed	$ 217,452.00

4.2 The claimants increased the claims for the estimated costs of the repair work by 8% at the hearing, to bring the costs up to today's real costs.

4.3 The claims against Mr Potter, Mr Candy and Mr Daly are all in tort and based on allegations of negligence. The Owners say that both Mr Candy and Mr Daly owed them a non-delegable duty of care to ensure that all building work was carried out in compliance with the building regulations. The claims against both of these parties are made in their capacity of directors of the company that developed the property and built the house, and also in their own personal capacity as builders and/or project managers. It is claimed that they both breached the duty that they owed to subsequent purchasers of the property by failing to carry out, or to have carried out, the building work in a compliant manner.

4.4 The claims against Mr Potter are similar, in that the Owners say that he was negligent in carrying out the work that he did as a part of the construction of this house and its site works, or ensuring that this work was carried out in compliance with the building regulations.

4.5 The claims against the Council are based upon allegations that it failed in its duty of care. The Owners allege that the Council should not have issued the building consent, it failed to carry out adequate and competent inspections, and that it issued the Code Compliance Certificate when the work did not comply with the standards of the Building Code.

5. FACTUAL ANALYSIS OF CLAIMS

5.1 In this section of my Determination I will consider each heading of claimed leaks, making findings on the probable cause of any leaks and then consider the

appropriate remedial work. In the next section I will consider the costs of the remedial work.

5.2 I will not be considering liability in this section. Also, I will not be referring to the detailed requirements of the New Zealand Building Code, although it may be necessary to mention some aspects of the Code from time to time. Generally, I will be trying to answer the following questions for each alleged leak:

- Does the building leak?
- What is the probable cause of each leak?
- What damage has been caused by each leak?
- What remedial work is needed?
- And at what cost?

5.3 There was a meeting of Experts held on the day before the hearing started, and as a result of that meeting the experts prepared a List of locations in which leaks have been identified in this building. There are ten areas or locations in which it was probable that moisture was getting into this dwelling. Therefore, I will consider the following areas or locations.

Leak No 1. Master bedroom – double doors leading onto the deck;
Leak No 2. Sitting area – window in south wall;
Leak No 3. Bedroom 3 – window in north wall;
Leak No 4. Living room – bi-fold doors leading out onto deck;
Leak No 5. Dining room – window in west wall;
Leak No 6. Front door;
Leak No 7. Living room ceiling – below doors mentioned in 1 above;
Leak No 8A. Garage – main entry door;
Leak No 8B. Garage – at base of east wall;
Leak No 9. Surrounding ground levels – above lower edge of cladding;
Leak No 10. General cracking in wall cladding.

5.4 I received evidence from three experts in this adjudication. One of these experts was Mr Cody who, although he is employed by the Council that is a respondent in this adjudication, I was prepared to allow to give his opinion on technical matters because he has valuable experience in leaky building claims. There was a level of agreement between these experts, which does make my

task slightly easier, because it has reduced the number of technical matters on which I am required to make a decision.

5.5 The experts all agree that there are currently leaks in most of the areas and locations mentioned in the Leaks List. There was not, however, agreement as to why all the leaks were occurring, so that I will need to consider all of the possibilities.

5.6 There are a number of general matters that need to be considered before I address the individual leak locations. I will, therefore, firstly review the evidence on the following:

- External cladding system.
- Windows and external door installation.
- Sills to deck doors.

5.7 **External Cladding**

5.7.1 The external cladding to the house is Harditex sheets with a textured acrylic paint finish. There is widespread cracking at the joints of the sheets to the extent that most of the joints have developed either cracks or are peaking. This cracking is allowing water to get behind the Harditex sheets and, in some cases, it has penetrated into the wall framing. However, the extent of obvious water penetration is limited, which may be due to the temporary sealant repairs that have been carried out by the Owners.

5.7.2 The experts are not in total agreement as to the cause or causes of this cracking. Mr White believes that the main cause is the absence of control or relief joints in the sheeting. Mr O'Connor is of the opinion that the cracking has been as a result of the way in which the Harditex sheets have been cut and jointed, which is not in accordance with the technical requirements of the manufacturers. He points to the way in which small panels have been used, the fact that some joints have been incorrectly aligned with the corners of window and penetrations, and the failure to bevel back the edges of sheets at joints.

5.7.3 There was some suggestion that the house had been cracking as a result of high winds, but there was no hard evidence to support that suggestion.

5.7.4 Mr O'Connor had taken a sample of the paint finish and found that it was only 220 microns in thickness. The minimum recommended thickness for the paint finish is 300 microns, so that the results of this sample threw doubt on the adequacy of the paint. I advised the parties that I thought that it was prudent to undertake further investigations and I asked the WHRS assessor, Mr White, to take three samples of the coatings during my site inspection of the property, which were sent for testing by an independent coatings expert.

5.7.5 These three coating samples showed an overall thickness varying from 367 to 486 microns. They indicated that there was a thin coat of sealer-type coating, and a second heavy textured coating of a titanium dioxide-based acrylic elastomeric coating. The laboratory also concluded that the coating had been probably applied using a hopper-type gun, and the surface had numerous minute surface air-bubble holes, which are typical with these types of coatings.

5.7.6 It was submitted by Ms Divich that the Hardie's technical literature referred to a minimum paint thickness of 300 micron, and that it is not clear from the literature whether this means that there must be a paint system applied over the textured cement coating, or whether the 300 micron should apply to the paint system or to a self-coloured textured system. It has also been suggested by Mr Devine that the paint system should have been applied in two or three coats, rather than in a single coat.

5.7.7 The Hardie's technical information booklet was produced by Mr Cody in his evidence. This booklet recommends that the minimum film dry thickness of the coating systems is 300 microns. It says that systems suitable for use over Harditex are 100% acrylic or pure elastomeric high-build texture coatings or flexibly-modified plasters. There is no requirement for a further paint coat over self-coloured acrylic elastomeric coatings, and no requirement for the textured coating to be applied in more than one coat (other than the necessary sealer coat). This is also in accordance with the BRANZ *Good Exterior Coating Practice* booklet published in November 1998 which, although not published until after this house had been completed, would represent an authoritative view on the matter of textured coatings at that time.

5.7.8 My conclusion would be that the paint samples do not indicate any fundamental defects in either the type of coating that was used, or the number of coats, or the thickness of the coating system.

5.7.9 This takes me back to the question that needs to be answered about the external cladding. Why has it failed to the extent that it has? Based upon the evidence given to me, I can only conclude that the reason for the widespread cracking in the cladding work must be workmanship issues, in that there were no control or relief joints built into the cladding, and the sheets were not properly fixed to the manufacturer's requirements. I think that it is now accepted in the building industry that these sorts of monolithic claddings allow little tolerance for errors in workmanship. This house is probably a good example of just how little the tolerances are.

5.8 Windows and External Doors

5.8.1 The windows in the house are domestic profile aluminium with a powder-coated finish. They have timber internal liners which are grooved to take the gibraltar board wall linings. They are face-fixed over the Harditex sheets, which means that the outside flange around the front of the windows project outside and over the external sheets. It is probably true to say that face-fixed windows require more care with their installation than windows that are fixed into a recess.

5.8.2 All windows have head flashings across the top of the window and these project either side of the windows by about 40-50mm. Mr White is critical of the failure to seal the ends of these flashings, and I noticed that the flashings had not been properly sealed where they passed through the slot in the Harditex sheets. Both of these failings could be allowing some water to get in behind the windows, although there is no direct evidence to show that there are leaks for these reasons.

5.8.3 There are no jamb or sill flashings to any of the windows and they all rely upon a tight fit of the flange against the Harditex, and the coat of paint that covers this junction. All of the experts agree that this is inadequate and does not meet the minimum requirements set down by the manufacturer of the Harditex sheets. The manufacturer recommends an in-seal strip be fixed behind the window flange and a bead of sealant run on the outside of this strip. I am satisfied that the experts are correct when they conclude that the inadequate sealing around the windows is the cause of many of the leaks in this building.

5.8.4 Mr O'Connor is of the opinion that the failure to provide an air-seal around the window is also contributing to the amount of water that is leaking into this

building. While I am sure that he is justified in reaching that conclusion, as it is supported by research that has been carried out by BRANZ, I am not so sure that there is any evidence to show how much of a contribution has been made by a lack of air-seals. I must say that proper air-seals around the windows would be particularly important in this exposed very high wind zone.

5.8.5 It was Mr Cody's view that the windows probably leak for a number of reasons, including the mitre pointing of the frames opening up, the glazing bead rubbers deteriorating, or a lack of maintenance of the junction between the windows and the cladding. He suggests that the very high winds experienced in this area could force water through any of these weak spots. Whilst I accept that these are all possible causes of leaking, there was no good evidence to support his opinion that this house was actually leaking for these reasons. I find that the main reason why there are leaks at, and in the vicinity of the windows is the inadequate sealing around the windows.

5.9 **Sills to deck doors**.

5.9.1 There is evidence that most of the external aluminium doors are leaking under, or around their sills. Mr O'Connor is of the opinion that this is largely as a result of poor workmanship, in that the junction between the upstand behind the cladding and the nib underneath the door sills is poorly formed. He found one example, in the master bedroom, where the building paper had been dressed behind the Butynol upstand, rather than taken down in front of the upstand.

5.9.2 It is difficult, at this stage, to be confident that the cause for the intermittent leaks at these doors is really known. I appreciate that it is never easy to be confident about causation until the work is fully opened up, and repair work is underway. However, the fact that Mr O'Connor saw water pumping up between the sill angle and the bottom rail of the doors at the south end of the Living room during times of heavy wind and rain, suggests that some of the water ingress could well be caused by inadequate weather seals within the joinery components.

5.9.3 The leaks at the doors sills appear to have caused a considerable amount of damage. I must accept the opinions of the experts who conclude that the leaks are probably caused by poor workmanship in the manner in which the nibs beneath the door sills are constructed and protected. However, I would

conclude that I also think that it is probable that some of the water that is finding its way to the bottoms of these doors is getting in behind the jamb flanges in the same way that leaks are occurring at the windows.

5.10 **Leaks No 1 to 5 inclusive**. These all relate to leaks around windows and external doors, and I have already considered the causes of these leaks above. The extent of the damage caused by these leaks is sufficient to justify the complete re-cladding of the building.

5.11 **Leak No 6** – Front door. I am satisfied that there are intermittent leaks at the jambs of this door, for similar reasons that I reviewed under the windows and cladding generally. In addition, the actual door has been leaking due to a breakdown of the door construction. Clearly, the door has been unable to stand up to the weather conditions, which indicates that it was not an exterior quality door. The door needs to be replaced.

5.12 **Leak No 7** – Living room ceiling. The cause of this leak is that water has been entering under (or around) the doors on to the deck above, and penetrating the ceiling of the Living room which is directly below. The damage caused by this leak will require the ceiling lining to be repaired and repainted.

5.13 **Leak No 8A** – Garage doors. There are two problems with the garage doors. Firstly, there is no head flashing to protect the head lining. Secondly, there is no protection at all at the jambs, so that water drives through the open gaps. Both of these deficiencies have caused water damage. The first defect will easily be fixed when the external cladding is replaced, and the second defect rectified by installing flashings between the jamb liners and the framing, and weather strips down the edges of the door opening.

5.14 **Leak No 8B** – at base of east wall. As the experts have pointed out in their reports, the level of the paving extends above the bottom of the external cladding at the path from the rear door to the garage, and at the front by the eastern end of the main garage door. Furthermore, the ground level of the neighbours' property has been raised, by backfilling against the east wall of the garage, which has buried the lower section of the cladding.

5.15 This type of external cladding should never be taken below ground level, nor should the adjacent gardens or paths be backfilled or raised so that they bury

the lower portion of cladding. In this case it has allowed water to wick up behind the cladding, and damage the timber wall framing. Either the soil or path levels must be lowered, or an impervious nib be constructed along the base of the wall so that the timber framing can be kept clear of the ground.

5.16 **Leak No 9** – surrounding ground levels. Mr White had told me at the hearing that there were sections of cladding that had been taken below ground level. He mentioned the walls in and around the garage area, which I have already considered under the previous item, but also a length along the kitchen wall. I could not see the area to which he was referring by the kitchen, and I therefore do not find that there are any additional leaks to those mentioned above.

5.17 **Leak No 10** – Cracks in cladding. These have already been considered in section 5.7 above. The extent of the damage caused by these leaks is sufficient to justify the complete re-cladding of the building.

6. CLAIMS FOR DAMAGES

6.1 I have summarised the claims that the Owners are making in this adjudication in section 4 of this Determination. In this section of my Determination I will consider each of these claims. The first four claims relate to the costs of repairing the leaks, and the damage caused by the leaks, which are:

- Repairs in June 2003 (insurance excess) 90.00
- Estimated cost of repair work (as Ortus estimates) 137,812.50
- Carpet replacement 4,751.00
- Redecoration of interior 7,290.00

6.2 **Repairs in June 2003.** The Owners had put in a claim against their house insurance policy for the leaks around the external doors. Their insurance company had arranged for a builder to carry out some repairs which comprised of applying sealant around the perimeter of the doors and associated repairs to the paintwork. I accept that this cost of $90.00, which was the excess payable by the Owners, is a part of the costs of attending to the leaks in this dwelling.

6.3 **Estimated costs of repairs.** The next claim is the amount of $137,812.50 for the repair work. This figure has been calculated by Ortus International Ltd, a firm of quantity surveyors. Their estimates are based on the assumption that the entire exterior cladding of the house will need to be replaced. It is the view

of both Mr O'Connor and Mr White that the leaks in this dwelling cannot be properly repaired by replacing bits and pieces of the cladding (usually referred to as targeted repairs), and that it will need to be completed re-clad.

6.4 Mr Cody was the only witness at the hearing who suggested that the building could be repaired by targeted repairs. He accepts that the southern elevation would probably need to be completed replaced, but any damage to the other three elevations could effectively be overcome by targeted repairs. I have looked at this house and I do not see that targeted repairs will provide anything more than a temporary fix. The extent of damage to the framing is not accurately known at present and, until the repair work is underway, will remain unknown. I accept the view of the other two experts, and accept that the repair work must include a replacement of the exterior cladding.

6.5 None of the respondents has made any challenge to the accuracy of the Ortus estimates, and I can see no reason to consider them to be inaccurate or unreliable. These estimates were prepared in July 2005, and the Owners have asked that an 8% increase be added to these estimates to accommodate the rises in the costs of labour, materials and building generally since July 2005. I think that this is a reasonable request, and it is in line with my own knowledge of current building costs. This increases the repair costs from $137,812.50 to $148,837.50.

6.6 **Betterment.** Ms Divich made submissions on the need to reduce the amount of remedial costs on account of the Owners being the beneficiaries of betterment. Her submissions were made as a general submission on the need to adjust the cost of items such as the cavity, painting (both inside and out) and carpet costs, which I will consider below.

6.7 The issue of betterment is often raised in building disputes and WHRS adjudications. I did suggest that I would be inclined to follow the line of reasoning given in my Determinations in earlier WHRS adjudications known as *Ponsonby Gardens*. I have received no submissions from any of the parties to indicate that they disagreed with that suggestion, or had alternative suggestions.

6.8 The first area of alleged betterment is the external painting of the house. I have calculated that the amounts allowed in the Ortus estimates for the cost of

the external painting are $8,100.00, which includes the appropriate amounts for margins, general costs and the 8% for increased costs. The house is now ten years old and has not been repainted since it was first built in 1996-7. I would consider that a realistic life expectancy for external paintwork on a monolithic cladding system in this part of Wellington is about 7 years. Therefore, this house is well past its due date for repainting.

6.9 Ms Divich has submitted that the introduction of a cavity behind the exterior cladding is also betterment. The Owners will not be allowed to re-clad without a cavity. They will not have the alternative of re-cladding in the same manner as that in which the house had been originally built. The cavity is a non-divisible part of the remedial work, and they are entitled to be put back into the same position, or as close as practically possible, as if the breach had not occurred. Therefore, I find that the inclusion of the cavity is not betterment.

6.10 In *Ponsonby Gardens* I found that to paint an existing previously painted surface in good condition would cost less than painting a new and previously unpainted surface. However, *Ponsonby Gardens* had a cement plaster external cladding, which is slightly different from a monolithic cladding system. I concluded that the Owners were entitled to recover the extra cost of painting on the new plasterwork over and above the cost of repainting after a normal life, and assessed these extra costs as being 55%. In this case, I would assess these extra costs as being about 35% of the total costs. Therefore, I will allow the Owners to recover 35% of these painting costs, which means that a deduction of $8,100.00 x 65% = $5,265.00 must be made for betterment.

6.11 This means that I will allow the estimated costs of $148,837.50 less $5,265.00 for betterment, or a total of $143,572.50 for the repair work.

6.12 **Carpet replacement.** The Owners are claiming that the carpets in the living room, dining room and master bedroom have been damaged as a result of the leaks. Based on the evidence given and my own observations during the site inspection, I think that the area of carpet that has been damaged by the leaks is quite small. I would assess it as being no more than 10% of the total area. Whilst I appreciate that it is not always possible to replace only a part of a carpeted area, due to difficulties in matching existing carpet colours and patterns, it is usually possible to restrict the amount of new carpet to only one

room, and use undamaged parts of the carpet from this room to repair the damaged areas in the other rooms.

6.13 The amount being claimed for the carpet replacement is $4,751.00. This quotation was obtained in December 2005, and the Owners have asked that an 8% increase be added to these claims to accommodate the rises in costs since the quotation was given. I think that this is a reasonable request, and it is in line with my own knowledge of current building costs. This increases the carpet costs from $4,751.00 to $5,131.08.

6.14 There is also the matter of betterment to be considered. I presume that the carpet is now about 10 years old, whilst the normal life expectancy of carpet in domestic situations is a maximum of about 12 years. Using the same method of adjustment that was used in *Ponsonby Gardens*, I will allow the following;

$5,131.08 x 10% =	$ 513.11
$5,131.08 x 90% x 2/12 =	769.66
Total amount allowed for carpet	$1,282.77

6.15 **Internal redecoration.** The Owners are claiming that it will be necessary to redecorate the interior of the house to repair the damage caused by the removal of all windows and external doors, and to repair the inspection holes made by the experts. I have been provided with a quotation from a painter for a total of $8,240.00, but this includes for repainting the internal doors. After deducting the amount for the doors, and adding GST the amount becomes $7,290.00. This quotation was obtained in August 2005, and the Owners have asked that an 8% increase be added to these claims to accommodate the rises in costs since the quotation was given. I think that this is a reasonable request, and it is in line with my own knowledge of current building costs. This increases the internal painting costs from $7,290.00 to $7,873.20.

6.16 There is also the matter of betterment to be considered. In this particular case, where the interior of the house is past the date by which it normally would have needed some redecoration, I think that it is appropriate to make a reasonable adjustment for betterment. I will allow a deduction of 60% of the costs of the internal decoration as betterment, which reduces the amount that can be recovered by the Owners to $3,149.28.

6.17 The next four claims that are being made by the Owners relate to fees charged by consultants and builders for inspecting the work for defects and preparing reports. These four claims are:

- Original Joyce Group report 1,037.25
- Second Joyce Group report 4,331.24
- Builder's costs for testing panels 697.50
- Ortus estimating fees 956.25

6.18 **First Joyce Report.** The Owners are claiming for the costs of $1,037.25 for Joyce Group carrying out the first inspections in June and July 2003. The Owners had lodged a claim with WHRS in May 2003, but were advised that an assessor would not be available for some time due to the number of claims that had been filed with WHRS. Rather than sit back and wait for the assessor, the Owners engaged their own consultants to find out whether it was safe to remain living in the house, or whether any immediate repairs should be undertaken. The report concluded with the recommendation that it would be necessary to completely replace the exterior cladding.

6.19 The Owners eventually received the WHRS assessor's report in April 2004, and confirmation that their claim had been accepted as an eligible claim under the WHRS02 Act. The WHRS assessor estimated that the cost of the repairs would be $88,200.00. I am satisfied that the Owners were sensible, and prudent, to seek immediate professional advice, rather than wait for the WHRS assessor. Under these circumstances I think that the costs of this first report of $1,037.25 should be recoverable as a proper part of the repair costs.

6.20 **Second Joyce Report.** The Owners then asked Joyce Group to return to carry out further inspections, and to prepare a more comprehensive report. This second report cost $4,331.24. They told me that they needed to confirm the viability of living in the house with their two small children, and that their bank needed assurance of the security over the mortgage. However, in Mr O'Connor's second report, he confirms that it was his understanding that a second report was needed to also assist the Owners in their presentation of the claims at adjudication. This was confirmed by the wording of the invoice for

professional services sent in by Joyce Group. This second report was prepared after further site inspections in May and June 2005.

6.21 I do not see all of the costs of this second report as being an essential step in the carrying out of repairs to this house. I think that its main purpose was to enable the Owners to have additional expert testimony for any attempted mediation, or for this adjudication. Whilst I accept that it was probably prudent to carry out some further tests to check that all leaks had been detected, I am not prepared to allow all of the costs of this second report to be recovered as a part of the repair costs. I will allow one third of the costs as being recoverable as a part of the repair costs, and will treat the remaining two-thirds as a part of the costs of this adjudication. Therefore, I will allow the amount of $1,443.75 on account of the costs of the second Joyce report.

6.22 **Builder's costs for test panels.** The Owners are claiming the costs of $697.50 for the costs of cutting inspection holes during the site inspections by Joyce Group, and covering up the holes after inspection. I do see these costs as being a necessary part of the inspection for leaks, and I will allow the amount as claimed as a part of the repair costs.

6.23 **Ortus estimating fees.** The Owners are claiming the costs of $956.25 for the preparation of detailed estimates of the costs of the remedial work. The WHRS assessor had already prepared estimates for the remedial work that he considered necessary, and I was not told why it was necessary to have further estimates prepared. I am not convinced that these estimates were an essential part of the repair work, and I have concluded that they were really a part of the costs of preparing for this adjudication. Therefore, I will not allow them as a part of repair costs, and will treat them as a part of the costs of this adjudication.

6.24 **Cost of sealant.** The Owners are claiming the costs of $38.44 for sealant used by them to provide temporary protection until the permanent repairs can be carried out. This is a small amount of money for a necessary and important task, and I will allow this claim in full.

6.25 **Interest.** The Owners are claiming interest on an Orbit loan that they have been required to take out to enable them to pay for legal and experts' fees. In the claims filed in this adjudication, they advised that the quantum of this claim

would need to be updated at the hearing, as the interest was increasing each month.

6.26 I have found that the Owners are entitled to reimbursement of several amounts that they have already paid to consultants and for materials. These have been paid at various times since 2003.

6.27 An adjudicator has the power to award interest pursuant to clause 15 in the Schedule to the WHRS Act, which reads:

> (1) Subject to subclause (2), in any adjudication for the recovery of any money, the adjudicator may, if he or she thinks fit, order the inclusion, in the sum for which a determination is given, of interest, at such rate, not exceeding the 90-day bill rate plus 2%, as the adjudicator thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.
>
> (2) Subclause (1) does not authorise the giving of interest upon interest.

6.28 I can exercise my discretion as to the rate and the period in accordance with the normal accepted principles. The Owners' costs for which I am allowing reimbursement have been incurred between July 2003 and October 2005. The 90-day bank bill rate has varied over the period from July 2003 to the present from 5.11% to 8.51%. I will allow the Owners' claim for interest at 1% higher than the 90-day bank bill rate, from the dates that they have had to pay the monies that I have deemed to be reimbursable, as simple interest.

6.29 I have calculated this interest on the above basis, and find that the Owners claim for interest will be allowed in the amount of $707.88 up to the date of this Determination. This interest will continue to accrue up to the date of payment.

6.30 **General Damages.** The Owners are claiming general damages in the amount of $30,000.00 for each of them for the distress, inconvenience and general disruption to their lives as a result of finding that their house had serious leaks. I will let them explain their claim in their own words.

> "We have suffered a significant amount of stress for the last 3 years. As the time elapsed to resolve our issues increases, our stress levels increase. We think and worry about this issue every day! It is a drain on our well-beings. We believe we are entitled to compensation for the stress that we have incurred throughout that period.

> "The weathertightness issue has been an ongoing stress for us for over 3 years, especially when concerned about our children's health. It has impacted our daily lives and put stress on our relationship and financial security. Any plans for our home have been put on hold. We are unable to fix the defects because there is no solution that is financially viable to us. We have had to take out additional loans to pay for lawyers, as we are not sufficiently familiar with the legal processes. We have had to pay for extensive and extremely intrusive tests to fully understand how serious the defects are with our home, because of the amount of time lapsed, and we did not want our children to be sleeping or living in a house where there was mould. Fortunately, the mould does not appear to be a threat yet."

6.31 At the time when the hearing was held, it had been held by the High Court that adjudicators did not have the power to make awards of general damages. This was in a judgment by Stevens J in *Hartley v Balemi & Ors*, Auckland High Court, CIV 2006-404-002589, 29 March 2007. This judgment considered an appeal against a WHRS adjudication Determination, in which the learned judge held that general damages claims for mental stress did not fit comfortably within the overall scheme of the WHRS legislation and its underlying policy considerations. He concluded that WHRS adjudicators had no jurisdiction to make awards of general damages for any mental stress in the context of a claim brought before the WHRS concerning a leaky building. I informed the parties that I was bound to follow this High Court decision, unless it was reversed by the Court of Appeal or changes were made to the WHRS Act.

6.32 The *Hartley* decision has not been considered by the Court of Appeal, and although the Government has indicated that it intends to amend the WHRS legislation, so that adjudicators will be empowered to make awards of general damages, no such legislation has been passed. Therefore, I have no jurisdiction to award the Owners any amounts for general damages.

6.33 However, having received and considered the evidence relevant to this claim, I will give the conclusions that I probably would have reached if I had the authority to make an award.

6.34 I am aware of awards for general damages that have been made by adjudicators in previous WHRS determinations. General damages had been claimed in 23 of the 52 Determinations that had been issued prior to the Hartley decision, and had been awarded in 17 cases. The amounts awarded have varied from a minimum of $2,000.00 (WHRS Claim 277 – *Smith*) to a maximum of $18,000.00 (WHRS Claim 27 – *Gray*), with the average amount being about

$6,000.00. In the recent *Dicks* case, the High Court awarded the plaintiff $22,500 for general damages.

6.35 The Owners purchased a house that was just under one year old. They were not aware that their house had any serious leaking problems until they sought professional advice about setting up a maintenance programme. This included sealing the cracks that had started to appear on the exterior of the building, prior to re-painting the exterior. When it became apparent that sealing the cracks was not going to be a straightforward process, they filed a claim with WHRS. It was only after their building consultant had carried out his thorough inspection of the house that the Owners realised that there were serious leaking problems with many parts of the external cladding.

6.36 It was clear to me from their evidence that some of their stress and worry had been caused by the concerns that the moisture may have been having an adverse effect on their children's health. It is also clear that their worries have also been caused by the financial uncertainty that was created when they realised that the house needed extensive repairs, and until these repairs were carried out, its value probably left them with something approaching a negative equity in the property. Whether this was the actual situation for these Owners does not alter the fact that to face a repair bill of over $150,000 would be likely to cause any owner a lot of worry.

6.37 The stress has not yet stopped. The Owners will have to repair their house and either they will have to move out whilst the work is done, or they will have to live with their young family in the middle of a construction site. This will entail living in a house that has tarpaulins over the windows for some of the time, and the resultant concerns about security, as well as having to get used to having builders in and around the property for probably four months.

6.38 However, the Owners would not be entitled to succeed with a claim that relies upon stress or anxiety caused by litigation, and the stress has to be as a direct consequence of a breach of contract or a breach of a duty of care, depending on whether the claim is based in contract or in tort. Therefore, I could not have made an award of general damages against any of the respondents on account of the length of time that this adjudication process has taken, or stress and worries of having to go through the dispute resolution process.

6.39 Having carefully considered the evidence I was satisfied that both of the Owners would probably have been entitled to a modest award of general damages. They were claiming $30,000.00 each, but I would have considered that this was too much under the circumstances. I would have set the amount of general damages as being $5,000.00 for each of the Owners, being a total amount of $10,000.00. However, as I do not have the jurisdiction to award these damages I can only leave their claims as unresolved.

6.40 **Summary of Claimed Damages.** I have found that the following costs should be accepted as remedial or repair costs, or as damages for the various leaks that have occurred in this house:

• Repairs in June 2003	90.00
• Estimated cost of repair work	143,572.50
• Carpet replacement	1,282.77
• Redecoration of interior	3,149.28
• Consultants costs	
Original Joyce Group report	1,037.25
Second Joyce Group report	1,443.75
Builder's costs for testing panels	697.50
Ortus estimating fees	0.00
• Cost of sealant in October 2005	38.44
• Interest on expenditure to date	707.88
• General damages, for both claimants	0.00
Total amount being claimed	$ 152,019.37

6.41 **Allocation of Repair Costs**. It may be necessary to allocate the repair costs against the various leaks or leak locations. However, this will be an extremely difficult exercise to carry out with any degree of accuracy, as the need to completely replace the exterior cladding tends to obscure the costs of repairing individual leaks. Therefore, I will defer this difficult task until after I have considered the liability of each of the respondents, and then carry out any allocation of costs as required by my findings on liability.

7. CYRIL POTTER

7.1 In or about August 1996, Mr Potter and his then wife agreed to purchase this property from the company known as Tri Housing to a design that had already been commissioned by Tri Housing. The property was at that stage an empty

section, but Tri Housing agreed to construct a house on the section for the Potters. One of the directors of Tri Housing was Mr Mark Daly, who was Mr Potter's son-in-law at that time. The Potters did not become the registered owners of this property until the building work had been completed, and a Code Compliance Certificate ("CCC") had been issued.

7.2 Mr Potter is a refrigeration and air conditioning engineer and in 1996-97 was in full-time employment as such. Prior to having this house built by Tri Housing, he had worked in his spare time applying the texture coatings to two other houses that were being built by Tri Housing. When it came to the house being built for himself and his wife, he decided that he would save money by applying the texture coating to his own house.

7.3 At the hearing, Mr Potter told me that he had carried out quite a bit more of the construction work on this house, mainly associated with the internal linings and finishing work. It appears that Tri Housing built the main structure of the house, up to the stage that it was a weatherproof shell, and then Mr Potter took over to finish off the external coatings and internal finishings.

7.4 I am satisfied from the evidence that Mr Potter was not the "builder" of this house, despite having carried out a considerable amount of the internal fittings and finishing work. Also, he was not the "developer", as Tri Housing owned the land up to the stage when all building work had been completed, and arranged for the design, the building consent, and the final CCC to be issued. Mr Potter may well have some responsibility for any defects in the work that he, personally, carried out on the house, but I find that he should not be held responsible for any design, supervision or management deficiencies that have contributed to any of the defects.

7.5 It is well established that builders owe a duty of care to owners and subsequent owners of dwellings to use reasonable skill and care to make sure that all work complies with the requirements of the Building Act 1991 (as it then was). This has recently been confirmed by Baragwanath J in *Dicks v Hobson Swan Construction & Ors,* Auckland High Court, 22 December 2006, CIV 2004-404-1065 at paragraph 32. In the same way that builders owe this duty, so do other contractors or tradesmen who carry out work on the property. Therefore, Mr Potter had a duty to exercise reasonable skill and care when carrying out his work on this dwelling, and if he breached that duty by failing to properly carry

out his texturing or internal finishing work, he will be liable for any damages that flow from that breach.

7.6 **Leaks No 1 to 5 inclusive**. These all relate to leaks around windows and external doors. I am not convinced that Mr Potter was involved with the installation of the windows and doors, and therefore, can have no liability for any damage caused by these leaks.

7.7 **Leak No 6** – Front door. I find that Mr Potter did not select or install this door and its frame, and therefore, can have no liability for the damage to this door.

7.8 **Leak No 7** – Living room ceiling. The cause of this leak was from the deck doors above, so that Mr Potter can have no liability for any damage caused by this leak.

7.9 **Leak No 8A** – Garage doors. I am satisfied that Mr Potter purchased the garage door, and either installed it or arranged for its installation. I find that he should be held liable for the defects in its installation.

7.10 **Leak No 8B** – at base of east wall. Mr Potter arranged for the drive and paths around the building, and he should not have permitted the levels of these paved areas to be raised above the bottom of the cladding. His negligence has caused the damage to the bottom of the walls in these locations. However, the greatest amount of damage has been caused by the backfilling on the neighbour's property – against the east wall of the garage. There has been no evidence to show that this backfilling was done by Mr Potter, or had taken place whilst Mr Potter owned the property, so that I cannot find that Mr Potter has been negligent in this regard.

7.11 **Leak No 9** – surrounding ground levels. I have already found that there are no extra leaks to be considered under this item.

7.12 **Leak No 10** – Cracks in cladding. As a finding of fact, I find that Mr Potter did not fix the building paper or Harditex sheeting to the outside of this house, but he did fill the joints between sheets, fix the plastic edging beads, and applied the textured coating to the exterior of the building. I have already found that the reason for the widespread cracking in the cladding work must be workmanship issues, in that there were no control or relief joints built into the

cladding, and the sheets were not properly fixed to the manufacturer's requirements.

7.13 It was submitted by Mr Devine and Ms Divich that Mr Potter should not have proceded with the external coating when he must have been able to see that the cladding sheets had not been properly installed. I think that this submission has some weight, but does it mean that Mr Potter should be responsible for the way in which the cladding sheets had been fixed? Having given this submission careful consideration, I have come to the conclusion that this is extending the boundaries of personal responsibility too far. Mr Potter was not the builder, nor the project manager, nor was he a supervising foreman. He was simply another tradesman working on the project. Whilst it may be highly desirable to have tradesman making helpful comments on the work done by fellow tradesman, I do not see that it should be considered as negligence to fail to draw attention to potential defects in the work of others on the site.

7.14 **Conclusion**. I find that Mr Potter was negligent in the manner in which he organised or carried out some of the work and this led to the defects that caused Leak 8A and part of Leak 8B. His negligence has led to water penetration and resultant damage. I will dismiss all other claims being made against Mr Potter.

7.15 I need to now assess the costs of repairing the leaks for which I have found Mr Potter to have a liability. I have reviewed the build-up of costs included in the Ortus estimates, and the other costs allowed in Section 6 of this Determination. I would assess the relevant costs that are attributable to the negligence of Mr Potter as being a total of $7,490.00.

8. CRAIG CANDY

8.1 The Owners are claiming that Mr Candy was a director of Tri Housing, and was the company's on-site representative during the construction of the house. They say that he was, in effect, the builder. As the builder, he owed all subsequent owners of the dwelling a duty to use reasonable skill and care to oversee the building work and to make sure that it complied with the requirements of the Building Act 1991.

8.2 I have already stated that it is well established that builders owe a duty of care to owners and subsequent owners of dwellings to use reasonable skill and care to make sure that all work complies with the requirements of the Building Act. Refer paragraph 7.5 above. However, Mr Candy says that he was engaged as a labour-only contractor by Mr Potter, and had one other carpenter to assist him. He denies that he was ever the builder or the site foreman (as alleged by Mr Daly), and he says that he left the site prior to the windows being installed or the exterior cladding being fixed.

8.3 As an alternative defence, it was submitted by Mr Cleary that Mr Candy was at all times acting as a director of Tri Housing, and that he never assumed personal responsibility for the company. This matter was recently considered at length by Baragwanath J in the *Dicks* case (mentioned above). In that case, the plaintiff had entered into a contract with a company, but it was held that the builder, a Mr McDonald, was personally liable to the owner in tort as well as for breach of contract. In the present case there is no question of breach of contract, because the Owners had no contractual dealings with Tri Housing or Mr Candy. It is no defence for Mr Candy to say that he was simply an employee, or was acting as a director or agent of the company.

8.4 It became clear at the hearing that Mr Candy's recollections of this building project were extremely hazy. This is not a criticism of Mr Candy, but an observation. This may not be surprising as the house was constructed in 1996-97, over ten years prior to the hearing. However, he does remember that he did not fit the windows or the cladding, whilst Mr Potter was adamant that Mr Candy and his carpentry assistant did carry out both of these tasks.

8.5 I have formed the view, after considering all the evidence, that Mr Candy was the person who would naturally be called the "builder" on this site. He told me that there were three directors of Tri Housing, and the usual way that they worked the company projects was for Mr Daly to source projects, for a Mr Skinner to organise materials and subcontractors, and for himself to do the building work. He offered no reason to indicate why this project would be any different from the norm, except that the client was a relative of Mr Daly, and that this client may be doing the external painting.

8.6 I will return to consider the role of Mr Skinner when I consider the liability of Mr Daly, as I do not see that Mr Skinner's alleged involvement affects my

conclusions about Mr Candy's liability in this matter. It is my conclusion that Mr Candy was the builder on-site when this house was built, and the only remaining issue to decide is when he actually left the site, and what work had been completed by him prior to his leaving the site.

8.7 The witnesses seem to agree that Mr Candy left this site to build a show home for Tri Housing at Whitby. He says it was in August 1996, and I think that it was more likely to have been in September/October 1996, as Mr Candy accepts that he was on site when the roofers put on the roof. The foundations on this house were not poured until the third week in August. Mr Potter says that the building was completed sufficiently for him and his wife to move into the house before Christmas 1996, and thinks that it may have been as early as the end of November. Therefore, it is unlikely that the roof would have been laid before early October.

8.8 On balance, I think that Mr Candy is mistaken about his involvement with the windows and cladding. It is unlikely that he would leave the house before it had been closed in, that is the stage when the roof is on and the outside walls are enclosed. It would be most unusual to employ a separate subcontractor to install windows on a housing contract, and as the windows can only be properly installed after the cladding has been affixed, then it follows that the on-site builder will usually do both cladding and windows. I find that Mr Candy did install the building paper, the Harditex cladding and the external windows and doors in this house.

8.9 **Leaks No 1 to 5 inclusive**. These all relate to leaks around windows and external doors. It was Mr Candy's job to make sure that the windows and doors were properly installed. He failed to do that. The inadequate seals around the jambs of the windows are a cause of many of the leaks in this building. He should have known that, at the very least, an In-seal strip should have been inserted behind the flanges, and a bead of sealant run on the outside of this strip. His failure to make sure that the windows and doors were installed properly was negligence.

8.10 **Leak No 6** – Front door. Mr Candy must also be responsible for the leaks at the jambs of this door, as they were caused by the same faults that I found existed with the window jambs. However, I am not satisfied that it has been demonstrated that Mr Candy purchased the front door, and it would not have

necessarily been obvious that the door was not suitable for exterior use. He should not be responsible for the replacement of this door.

8.11 **Leak No 7** – Living room ceiling. The cause of this leak was from the doors above, so that the finding on liability for this leak will follow my findings for leaks No 1 to 5 above.

8.12 **Leak No 8A** – Garage doors. I have already decided that I am satisfied that Mr Potter purchased the garage door, and either installed it or arranged for its installation. Therefore, Mr Candy should not bear any responsibility for the defects in the installation of the door.

8.13 **Leak No 8B** – at base of east wall. Although Mr Candy installed the Harditex, this defect did not exist until Mr Potter arranged for the drive and paths to be poured around the building, and the backfilling was carried out on the neighbour's property – against the east wall of the garage. Therefore, Mr Candy should not bear any of the responsibility for the damage caused at the base of these walls.

8.14 **Leak No 9** – Surrounding ground levels. I have already found that there are no extra leaks to be considered under this item.

8.15 **Leak No 10** – Cracks in cladding. I have found that Mr Candy did fix the building paper and the Harditex sheeting to the outside of this house. I have already found that the reason for the widespread cracking in the cladding work must be workmanship issues, in that there were no control or relief joints built into the cladding, and the sheets were not properly fixed to the manufacturer's requirements.

8.16 Mr Candy said that he wasn't sure how many houses he had built prior to this one which had Harditex cladding. It would seem from the way in which the sheets were fixed, and the number of departures that were made away from the Hardies recommended fixing methods, that Mr Candy was not familiar with the correct way to fix the sheets. I find that Mr Candy was negligent in the way that he fixed the cladding, or in the way that he allowed the cladding to be fixed.

8.17 **Conclusion**. I find that Mr Candy was negligent in the manner in which he organised, carried out or supervised the building work on this project, and therefore was in breach of the duty of care that he owed to these Owners. His negligence has led to water penetration and resultant damage. I find that he should be liable for the cost of repairing all of the above defects except the damage caused by Leaks 6 (front door only), 8A and 8B.

8.18 I need to now assess the costs of repairing the leaks for which I have found Mr Candy to have a liability. This will, of course, be the majority of the repair costs but a small amount will need to be deducted for the repair costs of the front door, the garage door opening, and lowering ground levels. I would assess the relevant costs that are attributable to the negligence of Mr Candy as being a total of $143,769.

9. MARK DALY

9.1 It is claimed that Mr Daly was the person who managed and supervised the development of this house on behalf of Tri Housing. They say that Mr Daly owed a duty of care to all subsequent owners to use reasonable care to ensure that the house was built in accordance with the provisions of the Building Act 1991.

9.2 Mr Mark Daly told me that he was a qualified butcher who, in 1996, was working full time for a supermarket group at Kilburnie and Mirimar. He had some experience in the buying and selling of houses, had completed a correspondence course in real estate, and had earned his practising certificate. In October 1996 he started to work for a real estate firm in Lower Hutt.

9.3 He had started Tri Housing with Mr Candy and Mr Dennis Skinner in 1995 as a property development company. He told me that Mr Skinner was his uncle and an electrician, and he had helped Mr Daly by introducing him to some of his business contacts. When it came to setting up Tri Housing, Mr Skinner did not want to be a director or a shareholder as he was having some difficulties with his electrical company at that time. However, Mr Daly told me that Mr Skinner was the person who organised the subcontractors and materials for Tri Housing's contracts, and wrote out most of the cheques.

9.4 The property at 21 Murchison Street had been purchased by Tri Housing, a house had been built on the section, and the property was then sub-divided to

provide another house site. The first house, at 21A, had been completed and sold by the time Mr Potter decided that he would buy 21B.

9.5 The question that I need to answer is what extent was Mr Daly personally involved with the design and construction of the house at 21B Murchison Street. Mr Daly says that at this time he was living in Lower Hutt. He says that he visited the site from time to time, usually when his wife wanted to visit her parents, who were renting a house that was only five minutes away from Murchison St. Mr Potter, however, says that Mr Daly was frequently on site and was managing the building process in conjunction with Mr Candy.

9.6 I now need to return to consider the role of Mr Skinner in this matter. Mr Skinner was not mentioned by either Mr Daly or by Mr Candy in their responses or witness statements prepared for this adjudication hearing. His name was first mentioned when Mr Matsis was cross-examining Mr Potter at midday on the second day of the hearing. It was not until later that I was told by Mr Candy that the usual way that they worked the company projects was for Mr Daly to source projects, for Mr Skinner to organise materials and subcontractors, and for himself to do the building work. I was advised that Mr Skinner was not able to give evidence because he had passed away some two or three years ago.

9.7 It was submitted by both Ms Divich and Mr Devine in closing that the very late disclosure about the involvement of Mr Skinner was no more than a convenient recollection by Messrs Daly and Candy, in an attempt to pass liability on to a deceased person. I do think that it was very strange that neither of them saw fit to explain the role that Mr Skinner played in the affairs of the company at an earlier stage in these proceedings, but I do accept their evidence that much of the administration was handled by Mr Skinner.

9.8 In conclusion, I find that Mr Daly was instrumental on organising the design for this house, and arranged for the property to be sold to Mr Potter. However, I am not persuaded that Mr Daly was personally responsible for managing or supervising the building work. He visited the site to check on progress, but not to check on quality and workmanship. As a result of these findings, it follows that Mr Daly will not be found to be responsible for any of the defects in the construction work that have led to the leaks in this house. I will dismiss all claims being made against Mr Daly.

10. WELLINGTON CITY COUNCIL

10.1 It is claimed by the Owners that the Council owed them a duty of care when carrying out its statutory obligations under the Building Act. They claim that the Council was in breach of this duty by:

(a) Issuing a building consent when the application documents did not include sufficient detail as to how the building would meet the requirements of the Building Code,

(b) Failing to carry out adequate inspections during construction and/or failing to take sufficient care when carrying out inspections so as to identify the defects in the building work,

(c) Issuing a final CCC when there were insufficient grounds to show that the work complied with the Building Code.

10.2 It is well established in New Zealand that both those who build houses, and those who inspect the building work, have a duty of care to both the building owners and to subsequent purchasers. This has been established, not only by the Court of Appeal in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, but confirmed in the recent decision of Baragwanath J in *Dicks* (mentioned above).

10.3 It is submitted by Ms Divich, on behalf of the Council, that the Council's duty of care to the Owners is limited or restricted in the following ways:

- The Owners must prove that The Council was in breach of its obligations, and that the leaks were actually causing damage;

- The Council's inspectors are not clerks of works, and are reliant on those on site not to cover up defects;

- The standard of care is the standard applicable at the time of the inspections (as stated by Cooke P in *Askin v Knox* [1989] 1 NZLR 248);

- The level of knowledge that we now have about leaking buildings is well above the level of knowledge that existed in 1996;

10.4 These are all points that must be borne in mind, but I am not persuaded to move away from the fundamental question that I need to ask in relation to each particular leak location. The question is whether a prudent building inspector, carrying out the inspections and tests that should have been done by a prudent inspector in 1996-97, should have noticed or detected the particular defect. The words of Greig J in *Steiller* should also be borne in mind "the standard of care can depend on the degree and magnitude of the consequences which are likely to ensue."

10.5 **Issue of Building Consent**. The claimants are making a number of general allegations about the adequacy of the drawings and specifications submitted by the developers for a building consent. The one detailed claim is that the Council did not require any detail as to the fitting and appropriate waterproofing of windows and other penetrations when the building consent was issued.

10.6 It appears that the building consent was not issued until after the pre-line inspection took place. This, in itself is an unusual situation, but no-one was called to explain why this had happened. Mr Devine suggests that it is difficult to avoid a conclusion that the Council was negligent, simply on the grounds that it allowed work to proceed without a building consent. He asks how the Council's inspectors could possibly be able to check that the work was being done in accordance with the building consent, when there was no building consent.

10.7 There is no clear explanation regarding the apparent inconsistencies in the dates. Assuming that the dates shown in the records have not been corrupted or mis-read during archiving, then the Council officers were allowing far too much tolerance to the developers. I am not prepared to draw any more serious conclusions, other than to find that the Council's procedures were slack. It does not directly affect my consideration of the allegation that the Council was negligent when issuing the building consent.

10.8 Ms Divich submits that the experts seemed to agree that the plans and specifications that were approved by the Council for the building consent were of the standard that was considered adequate in 1996. I would accept that this is probably correct. They did not include any incorrect or faulty detailing, but then they did not include much detail at all. I do not accept that it has been shown that the plans, or details on the plans, were incorrect. There could have

been much more detail, and more detail would have been required by the builders on site when they came to construct the house, but I find that they were adequate for the Council to accept for building consent purposes.

10.9 I am not persuaded that the Council was negligent in the manner in which it allowed the building consent to be issued for this building project. The documentation submitted by the developer/builder was not inadequate for the purposes of issuing a building consent, but was not really adequate for construction purposes.

10.10 **Inspections** I have found that the Council had a duty to take reasonable care with its inspections so that it could conclude that it had reasonable grounds for saying that the provisions of the Building Code were being met. It is now necessary to review each of the leak locations that have caused damage to the building to ascertain whether the Council was in breach of its duty of care.

10.11 **Leaks No 1 to 5 inclusive**. These all relate to leaks around windows and external doors. Ms Divich submits that it was not possible for the Council's inspectors to see whether these joinery units were properly sealed behind the flanges. Mr O'Connor disagrees, and says that it would have been obvious to the inspectors because the flanges would have been held proud of the cladding by the strip seal if the proper seals had been applied.

10.12 I accept Mr O'Connor's opinion on this matter. Furthermore, Mr Potter told me that the cladding had been sealed, but not textured, when the Council carried out its final inspection. If this was the case, it would have been very easy for any inspector to see this junction, and carry out a simple test with a credit card, or similar feeler gauge, which would have confirmed the lack of sealant.

10.13 In the *Dicks* case (mentioned above) Baragwanath J concluded that it was the Council's task to establish and enforce a system that would give effect to the Building Code. He was referring to the crucial importance of seals around windows as a substitute for cavities and flashings, and the need to check for these seals. He concluded that the absence in that case of both any instructions and of any system to discern whether seals were in place, was an abdication of responsibility by the Council. His Honour was considering a house that had been built in 1994. I am considering a house built in 1996-97, so that there had been two further years for a Council to have set up the systems

referred to by Baragwanath J. The inspector's failure to make sure that the windows and doors were installed properly was negligence.

10.14 **Leak No 6** – Front door. The Council must also be responsible for the leaks at the jambs of this door, as they were caused by the same faults that I found existed with the window jambs. However, I am not satisfied that the inspector should have noticed that the door was not suitable for exterior use. The Council should not be responsible for the replacement of this door.

10.15 **Leak No 7** – Living room ceiling. The cause of this leak was from the doors above, so that the finding on liability for this leak will follow my findings for leaks No 1 to 5 above.

10.16 **Leak No 8A** – Garage doors. Both of the defects with this door opening would have been clearly visible to the Council's inspector, and should have been noticed as being inadequate. The failure to notice these defects was negligent.

10.17 **Leak No 8B** – At base of east wall. I am not satisfied that it has been shown that either the paths or the driveway had been poured at the time of the final inspection. Neither the paths nor the driveway were included in the building Consent. There is no evidence to establish when the ground levels on the neighbouring property were raised against the garage wall. Therefore, I find that these defects are not the responsibility of the Council.

10.18 **Leak No 9** – Surrounding ground levels. I have already found that there are no extra leaks to be considered under this item.

10.19 **Leak No 10** – Cracks in cladding. I have found that the reason for the widespread cracking in the cladding work must be workmanship issues, in that there were no control or relief joints built into the cladding, and the sheets were not properly fixed to the manufacturer's requirements.

10.20 Mr Cody was of the opinion that, because the Council did not carry out cladding inspections, then there was no opportunity for the Council's inspectors to view and check on this aspect of the work. However, as I have already mentioned, Mr Potter had not carried out the texture coating at the time that the inspectors carried out their final inspection. Therefore, they would have easily been able to see the lines of the sheets joints, the absence of control joints, and probably

the nailing pattern of the sheets. The failure to notice these defects was negligent.

10.21 I should also mention that the fact that a Council may not have introduced a cladding inspection at this time is not necessarily a good reason for avoiding liability. Referring again to the decision in the *Dicks* case (mentioned above) I would have thought that it was the Council's task to establish and enforce a system that would give effect to the Building Code. Monolithic claddings need to be installed correctly, and the need to check their installation with appropriate care should have been appreciated by the Council.

10.22 **Conclusion**. I find that the Council was negligent in the carrying out of its duties to inspect, as more fully explained in the preceding paragraphs, and thereby in breach of the duty to take care that it owed to the Owners. This negligence has led to water penetration and resultant damage. I find that the Council should be liable for the cost of repairing all of the above defects except the damage caused by Leaks 6 (front door only), and 8B.

10.23 I need to now assess the costs of repairing the leaks for which I have found the Council to have a liability. This will, of course, be the majority of the repair costs but a small amount will need to be deducted for the costs of lowering ground levels and the front door. I would assess the relevant costs that are attributable to the negligence of the Council as being a total of $144,359.

11. CONTRIBUTORY NEGLIGENCE

11.1 It is alleged by the Council that the Owners' own negligence has directly caused or contributed to all or part of the Owners' own losses. The Council is saying that the Owners have been negligent in the following ways:

1. Failing to take adequate steps to reduce or mitigate their losses, in that they failed to investigate and rectify the defects, and

2. Failing to maintain the property, including washing down, re-coating protective finishes, re-sealing and the like.

11.2 This defence relies upon the provisions of the Contributory Negligence Act 1947, and in particular s.3(1) which states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that –
>
> (a) This subsection shall not operate to defeat any defence arising under a contract:
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

11.3 "Fault" is defined in s.2 in this way:

> Fault means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

Failure to Mitigate

11.3 The duty to mitigate by a claimant is a duty to take all reasonable steps to prevent a defect from continuing to increase the damage to a property. Therefore, if claimants discover a leak in their house, they should carry out, at the least, temporary repairs to prevent the leak from causing further damage. Of course, the claimants may have sufficient technical knowledge and advice, and be in a financial situation which enables them to carry out permanent repairs immediately, but that is not always the case.

11.4 In this particular case, the Owners wanted to have the exterior of their house re-painted. They called in professional advice, and were told that the cracks in the exterior cladding should be filled and sealed before repainting the outside. When they sought a quotation for this work, they were told that the texture coating was inadequate, and that the whole of the outside would need to be re-textured and painted. At this stage they registered a claim with WHRS.

11.5 The WHRS was, at that time, under considerable pressure from the number of claims that had been filed from throughout the country, so that an Assessor could not be allocated to their claim for a number of months. Eventually, the Assessor carried out his inspection and filed his report, but it was eleven months after the Owners had filed their application.

11.6 Due to the delays in obtaining a WHRS inspection the Owners employed a building consultant to look at their house, so that they could find out as quickly as possible whether they had a small or a large problem. They also wanted help on what immediate steps they should be taking to protect their house. This, in my opinion, is a prime example of claimants taking steps to mitigate their losses.

11.7 Mr Prestwood told me that he had been applying sealant to as many cracks as he could reach, and told me of a number of small repairs that he has done. I am satisfied that the Owners have taken all reasonable steps under the circumstances to reduce the amount of damage that this house has suffered as a result of the defects and leaks. I find that this particular claim for a contribution from the Owners must fail.

Failure to Maintain

11.8 It is submitted by Ms Divich that the external cladding of the dwelling has not been maintained. She suggests that this has accelerated the deterioration of the cladding and increased the amount of damage that the dwelling has suffered.

11.9 The Owners told me that they had carried out normal maintenance by washing down the outside of their house, and by sealing the cracks that I have already mentioned. When they decided that the exterior needed to be re-painted, the building was about eight years old. A textured cladding such as this should have a realistic life expectancy of seven years, and should not need to be re-painted any earlier than these Owners were planning to do. The evidence in this case is that the Owners have not caused the leaks by their own actions, or lack of action. I find that these particular claims for a contribution from the Owners must fail.

12. CONTRIBUTION BETWEEN RESPONDENTS

12.1 I will now turn to the matter of considering the liability between respondents. Our law does allow one tortfeasor to recover a contribution from another tortfeasor, and the basis for this is found in s.17(1)(c) of the Law Reform Act 1936.

> Where damage is suffered by any person as a result of a tort … any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is … liable for the same damage, whether as joint tortfeasor or otherwise …

12.2 The approach to be taken in assessing a claim for contribution is provided in s.17(2) of the Law Reform Act 1936. It says in essence that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage. What is a 'just and equitable' distribution of responsibility is a question of fact, and although guidance can be obtained from previous decisions of the Courts, ultimately each case will depend on the particular circumstances giving rise to the claim.

12.3 It should be noted that most of the arithmetical calculations in this Determination have been carried out in electronic spreadsheets, where calculations are computed to many decimal places. This will sometimes result in apparent discrepancies when the figures are rounded off at two decimal places or at whole numbers. For example 1 + 1 = 3, because the full calculation is actually 1.45 + 1.45 = 2.9. As these apparent discrepancies are of very small value, they have no material effect on the calculations as a whole.

12.4 The main burden of responsibility for the defects that have caused the need to re-clad this building must fall upon those who organised, supervised and carried out this work, that is Tri Housing and Mr Candy. As Tri Housing is in liquidation and is not a respondent in this adjudication, it all falls upon the shoulders of Mr Candy.

12.5 As far as the Council is concerned, the first reported case in New Zealand where apportionment of responsibility was made in a defective building matter was *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 235. In that case the Court of Appeal allowed the Council to recover a contribution from the builder of 80%. This was a case that concerned defective foundations, and was not a leaking building. In WHRS adjudication Determinations there has been a tendency to set the contribution of the Councils (and Certifiers) at around the 20% level, although it has been set as high as 35%. In the recent *Dicks* case in the High Court, the contribution was set at 20% but for no apparent reason except that this was the contribution for defective foundations set back in 1979. However, I would note that Judge Hubble in *Standen v Waitakere City Council & Ors,* Waitakere District Court CIV 2657/04, June 2007, set the Council's contribution at 60% in a Leaky Home case.

12.6 Each case must be judged on its merits, and in this case I would tend to follow the logic that I applied in the *Ponsonby Gardens* Determinations. When considering the backing to the exterior cladding, I decided that the Council's liability should be at no less than half of that allocated to the builder. The Council in this case should have noticed that the Harditex was not fixed properly, and definitely should have noticed that there was no seal at all around the windows and doors. Under these circumstances I will set the Council's contribution at one third, and the builders contribution as two thirds. Therefore, the contributions will be:

For Mr Potter

Leak No 8 A – 2/3rds of $590	$ 393
Leak No 8 B – 100%	6,900
	$ 7,293

For Mr Candy

Main re-cladding costs – 2/3rds of $143,769	$ 95,846

For Wellington City Council

Main re-cladding costs – 1/3rd of $143,769	$ 47,923
Leak No 8 A – 1/3rd of $590	$ 197
	$ 48,120

12.7 **Summary** In the event of all respondents meeting their obligations as ordered in this Determination, then the amounts that they will pay to the Owners will be as follows:

From Mr Potter	$ 7,293
From Mr Candy	95,846
From the Wellington City Council	48,120
Total payable to the Owners	$ 151,259

12.8 It should be noticed that the total of $151,259 does not equal to the total value of the repair costs of $152,019 that I accepted in Section 6 of this Determination. The reason for the difference is that I had found that none of the respondents should be held liable for the costs of replacing the front door – Leak No 6.

13. COSTS

13.1 It is normal in adjudication proceedings under the WHRS02 Act that the parties will meet their own costs and expenses, whilst the WHRS meets the adjudicator's fees and expenses. However, under s.43(1) of the WHRS02 Act, an adjudicator may make a costs order under certain circumstances. Section 43 reads:

> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by –
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit.
>
> (2) If the adjudicator does not make a determination under sub-section (1), the parties to the adjudication must meet their own costs and expenses.

13.2 None of the parties in this adjudication have made claims for the recovery of their costs, and I do not think that there are any particular circumstances that would justify an award of costs. Therefore, I will make no orders as to costs.

14. ORDERS

14.1 For the reasons set out in this Determination, I make the following orders.

14.2 Mr Potter is ordered to pay to the Owners the amount of $7,490. Mr Potter is entitled to recover a contribution of up to $197 from Mr Candy, and/or a contribution of up to $197 from the Wellington City Council, for any amount that he has paid in excess of $7,293 to the Owners.

14.3 Mr Candy is ordered to pay to the Owners the amount of $143,769. Mr Candy is entitled to recover a contribution of up to $7,293 from Mr Potter, and/or a contribution of up to $48,120 from the Wellington City Council, for any amount that he has paid in excess of $95,846 to the Owners.

14.4 Wellington City Council is ordered to pay to the Owners the amount of $144,359. The Council is entitled to recover a contribution of up to $7,293 from Mr Potter, and/or a contribution of up to $95,846 from Mr Candy, for any amount that it has paid in excess of $48,120 to the Owners.

14.5 As a clarification of the above orders, if all respondents meet their obligations contained in these orders, it will result in the following payments to the Owners:

From Mr Potter	$ 7,293
From Mr Candy	95,846
From the Wellington City Council	48,120
Total payable to the Owners	$ 151,259

14.6 No other orders are made and no other orders for costs are made.

Notice

Pursuant to s.41(1)(b)(iii) of the Weathertight Homes Resolution Services Act 2002 the statement is made if an application to enforce this determination by entry as a judgment is made and any party takes no steps in relation thereto, the consequences are that it is likely that judgment will be entered for the amounts for which payment has been ordered and steps taken to enforce that judgment in accordance with the law.

Dated this 6th day of August 2007.

A M R DEAN
Adjudicator

792-989-Determination